Supreme Court, U.S.
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No. 02-411

In The

Supreme Court of the United States

PLAYGIRL, INC.,

Petitioner,

v.

JOSE SOLANO, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

KENT R. RAYGOR
Counsel of Record
AMY JOHNSON HARRELL
SHEPPARD MULLIN RICHTER & HAMPTON LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071
(213) 620-1780

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. SOLANO HAS NOT ADDRESSED HIS FAILURE TO PROVIDE ANY EVIDENCE THAT ANY READER ACTUALLY UNDERSTOOD THE COVER TO SEND A FALSE MESSAGE ABOUT SOLANO.

It is respondent Solano's burden to provide *some* evidence on the following false light element: whether petitioner Playgirl's January 1999 cover was actually understood by the readers to whom it was addressed as sending a false message about Solano. (Petition, at 22-23.) Solano's opposition brief[1] nowhere points to any such evidence, and instead only indirectly *suggests* that Playgirl's own editors "conceded" or "admitted" that the language *could* be read this way. (Opposition, at 12.)

Even if this were the case (and Playgirl disputes this characterization),[2] Playgirl's editors do not qualify as "the readers to whom Playgirl is addressed." First, editors involved in the composition of magazines read the cover with knowledge and experience average readers do not have. Second, a reader sees the magazine in the neutral environment of a mailbox or a newsstand. The editors, however, were questioned in the context of a lawsuit that asserts the primacy of one meaning for certain language over many other possible meanings. Their testimony is not independent; nor can it convey what actual readers thought at the time of publication. The Ninth Circuit failed to recognize this complete failure of any proof, and, accordingly, its reversal and remand is clear error.

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[1] Solano's opposition brief was filed two days after the submission deadline of October 15, 2002.

[2] For example, Solano simply stitches together a number of Senior Vice President Carmine Bellucci's answers to deposition questions divorced from the context of the cover, without asking what Bellucci thought the cover as a whole conveyed. Solano also improperly omits the first question in a series about the disputed cover word "exposed," and Bellucci's answer, which stated that to him the word meant "reportage" or "journalistic exposure" – not nudity. (Reply App. 2-3.)

II. PLAYGIRL'S CHALLENGE TO THE "REASONABLY POSSIBLE" STANDARD IS LIMITED TO A NARROW FACTUAL CIRCUMSTANCE.

Solano's citations to multiple decisions applying the "reasonably possible" standard miss the point.[3] Playgirl does not deny the test is appropriate where a single statement is being evaluated for its truth or falsity. Application of the standard in that context at least provides some notice; editors can avoid the risk of lawsuits by looking for text with possible defamatory content. Playgirl argues only that a different standard is required in a particular, limited fact situation – when a plaintiff asserts that juxtaposition of multiple disparate elements on a magazine cover may convey a message not clearly conveyed by text alone.

In this narrow situation, the "reasonably possible" standard overregulates speech and substantially risks chilling it. It is impossible for editors to begin to identify the risk – to guess which elements in which combination a jury might through some extremity connect to find a false message. Yet the consequences of not doing so are huge – the possibility of a large verdict and the expense of extended litigation. Studies show the steady rise over the years in jury damages awards when a defamation case goes to trial, and the corresponding expense in litigation of such cases. In 1989 and 1990 the average award exceeded $4 million. *See* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 514 (1991). At least

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[3] As to the contention that application of the "reasonably possible" standard did not subvert justice in this particular case, Playgirl has standing to challenge an overbroad standard even if the Court finds that the facts of this particular case do not implicate the risks it articulates. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984) (citing the overbreadth doctrine as an exception to the general standing principle that requires people to assert only their own rights).

one commentator has noted that the high stakes of defamation litigation and its unpredictability mean parties are likely to spend more to litigate the case than the actual chances of recovery would support. *Id.* at 515 (1991) ("This is probably one reason why legal fees account for about eighty percent of the total cost of libel suits against the press.") (citing as the source of that figure Rodney A. Smolla, SUING THE PRESS 75 (1986)).

Publishers will never stop plaintiffs from filing lawsuits, and under a notice pleading standard may not realistically be able to obtain a dismissal at the pleading stage. Summary judgment thus is an important tool for protecting speech because it is the only point at which the real costs – both monetary and societal – of a lawsuit can be limited. Where, as here, the intersection of facts and the standard used by the Ninth Circuit effectively eliminate the availability of summary judgment,[4] publishers are likely to self-censor, stifling creativity in presentation of truthful speech, because every lawsuit will result in an expensive trial. The cumulative harmful public effect of this chilling of speech must outweigh any interest in compensating an individual for hurt feelings alone.

Playgirl's proposal – to require a showing of special damages before permitting a false light case based on juxtaposition to move forward[5] – addresses this narrow issue without rewriting the law wholesale. It recognizes the risk to the public good posed by a narrow theory of

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[4] Where few or no cases are decided on summary judgment, the role of the fact-finder is unduly elevated. Changing the standard in this narrow set of circumstances does not "sap" the role of the fact-finder, as Solano argues, but rather restores the balance that exists in defamation and false light cases based on text only (as opposed to juxtaposition).

[5] The proposed alternative standard is further limited by only applying where an innocent message is *reasonable* in context. Solano's use of the phrase "conceivably susceptible to an innocent construction" is not what Playgirl proposed.

recovery and asks individuals to show an objective verification of harm to justify that risk. It does not eliminate general damages. If a plaintiff could show special damages as a threshold issue, the case could move forward with the full range of penalties available. If not, the case would simply be dismissed. If this contradicts *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), it is an exceedingly limited and practical exception narrowly tailored to protect important speech concerns.

III. THE COVER DID NOT CONTAIN INTENTIONALLY FALSE SPEECH: SOLANO'S EVIDENCE RE ACTUAL MALICE IS NOT "CLEAR AND CONVINCING."

Playgirl has never argued that Solano must demonstrate that he is *certain* to win at trial on the actual malice issue. But *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), requires that the heightened clear and convincing proof standard for actual malice be taken into consideration at summary judgment; as a result, something more substantial than a mere conflict of the evidence, let alone a conflict created by internally unreliable evidence, is required.[6] None of the evidence Solano cites is sound.

Bellucci's alleged directive that staffers "sex up" the magazine's covers is purely circumstantial. Associate editor O'Rourke testified that such statements were made over a period of several months, not just for the January 1999 issue. (Solano App 7a.) It is not reasonable to infer

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[6] Playgirl also has never disputed that circumstantial evidence may factor into a court's or jury's decision about actual malice, but this Court could not have been more clear in its warning in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), that "courts must be careful not to place too much reliance" on such evidence. *Id.* at 667-68. It has also made clear that only *justifiable* inferences must be drawn in favor of the non-moving party, *see Masson v. New Yorker Magazine*, 501 U.S. 496, 520-21 (1991) – not "all possible inferences," as Solano asserts, relying on lower court decisions.

that this was connected to Solano. O'Rourke did not say she was told to "sex up" headlines about Solano. Solano provided no evidence that the content was not also "sexed up" at the same time, in which case encouraging the headlines to match would simply be accurate.

O'Rourke's alleged testimony "about intentional use of the word 'exposed' to convey a false impression of nudity," (Solano App. 15) and her alleged admission that she "didn't feel like it was fair to do that" are contradicted by her own testimony. Solano's counsel asked her whether editors were concerned that readers might think "primetime's sexy young stars" would be depicted nude – not Solano specifically. O'Rourke's response – including "some of us didn't feel like it was fair to do that" – was so vague as to time that Solano's counsel asked her to focus specifically on the meeting for the January 1999 issue: "Do you remember any particular discussion about the banner 'Primetime's Sexy Young Stars Exposed?'" O'Rourke answered: "*Not really*." (Reply App 12-13.)

Solano's characterization of O'Rourke's testimony about the "12 Sizzling Centerfolds" line – that it was placed where text regarding the cover model ordinarily appeared and that this "was done for a reason" – is misleading. O'Rourke explained that *design considerations* were the reason for the change (Reply App. 13-14):

> [W]e had already decided that we were going to use our TV Guys thing as a banner which is on top of the Playgirl logo, the "Primetime's Sexy Young Stars Exposed" headline. So being that we already had that, we were then talking about, okay, what's the next biggest thing we have in here. And the next biggest thing we had in there was the Man Of The Year ballot. But we didn't just want to put Man Of The Year ballot because that's just boring. So we wanted to give the illustration that there were 12 centerfolds in there. . . . So then we came up with this cover line for "12 Sizzling Centerfolds," and we put it there. Because I remember talking with Carmine. We thought that the 12 number would pop

> out at you well over here where usually the cover, subject cover line would go.[7]

O'Rourke's statement "someone's going to think that he's naked in there," read in context, refers only to the "12 Sizzling Centerfolds" headline (not broadly to "the headlines juxtaposed with Mr. Solano's photograph") and again is unclear as to time and substance – replete with words like "I think" and "I don't know," and time-generic statements like "we'd always say." (Reply App. 14.) She also testified that she and other junior editors overanalyzed such things because they were too methodical, and that the most ever said to Bellucci about putting the "12 Sizzling Centerfolds" headline to the left of Solano's photo is that it would "look strange," not that readers would think Solano was nude. (Reply App. 15.)

The final testimony on which Solano relies – that O'Rourke had a general recollection that the concerns were brought to Bellucci's attention[8] – bears special scrutiny. Here, Solano suggests that the fact that someone may have raised a concern about how the headlines read is a factor favoring liability. The implications of this are alarming. Debate and discussion should be encouraged so that editors can avoid mistakes. If simply talking about an issue can turn a "mistake" into "intent," plaintiffs will suffer because editors will find that they are better off not speaking up at all.

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[7] Art Director Joanne Chiaramonte confirmed this: "The '12 Sizzling Centerfolds,' that's something we do annually. Any of our readers know that once a year they get to vote for their centerfold, vote for Man Of The Year." (Reply App. 10.)

[8] Solano's citation of this testimony is misleading. Solano cuts off the actual testimony in the appendix at a point that suggests that Bellucci "blew off" such concerns. In fact, O'Rourke follows up by saying that Bellucci "really didn't think there was anything wrong with having 12 there next to the body because he didn't think it was suggesting anything." (Reply App. 14-15.)

IV. IN A FALSE-MESSAGE-BY-JUXTAPOSITION CASE, EXISTING ACTUAL MALICE STANDARDS DO NOT SUFFICIENTLY PROTECT SPEECH.

The actual malice standard offers far less protection than usual for speech in cases based on a possible false message by juxtaposition, where the issue is not whether a juxtaposition of words and photos is fundamentally "true" or "false," but rather the meaning a group of editors thinks a group of third-party readers will take from it -- and what the likelihood of one interpretation over another may be.

This raises difficult issues. For example, where the test is what the "average reader" will perceive, courts should not send a case to trial based on someone raising a mild concern about how a few sensitive readers "might" perceive the cover. In this context, "knowledge" of falsity and "reckless disregard" of truth relate to an editor's predictive abilities, and editors may disagree about the certainty with which a particular message is conveyed. One editor may raise the issue out of an abundance of caution and other more senior editors may consider the entire presentation of a page and decide that, taken as a whole, negative meanings do not predominate.[9] The failure of the actual malice inquiry to address the complications of this issue in this limited factual context supports the need

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[9] That is what happened here. The editors did not think the "Primetime's Sexy Young Stars" line would suggest Solano was nude because they believed that readers knew that when they had nude celebrity photos, they clearly stated that; and they understood "exposed" to convey that they were revealing "sexy pictures and information" or "explaining a revealing story." (Reply App. 6-7, 9-10.) They did not think readers would think "12 Sizzling Centerfolds" applied to Solano because it was an annual feature, because Solano's name was clearly used in another cover line, because Playgirl never used two separate cover lines to refer to the same feature and because there were design reasons for it being there. (Reply App. 7-8, 10-11, 13-14.)

for a more effective "gatekeeping" mechanism in advance of the actual malice inquiry.[10]

V. THAT THERE MAY BE NO FIRST AMENDMENT PROTECTION FOR INTENTIONALLY FALSE SPEECH DOES NOT MEAN THAT AN ACTION LIES FOR MISAPPROPRIATION WHEREVER THERE IS FALSE SPEECH.

Solano addressed the misappropriation issue by stating that the First Amendment does not protect intentionally false speech, but this does not truly address the point. That there may be no First Amendment protection for knowingly false speech does not mean that wherever there is false speech, there must be a misappropriation. Playgirl submits that even if a court were to find that an intentionally false message was conveyed, the situation simply falls outside the scope of this tort because Playgirl's use of Solano's photo and name does not implicate a commercial or merchandising right of Solano.

Put another way, the tort focuses not on *falsity*, but on the *use* of someone's name or image. Because the January 1999 issue contained a news story about Solano, it cannot be disputed that Playgirl would have been entitled to use Solano's name and image on the cover to publicize that story had there been no alleged falsity regarding the cover lines. *See Cher v. Forum International, Inc.*, 692 F.2d 634,

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[10] Despite Solano's argument, this Court has determined that the constitutional limitations on the substantive law addressing First Amendment activity may not alone be sufficient to protect speech. A prominent example of this is this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), in which it determined that the courts must independently review on appeal the evidence supporting a trier of fact's decision, in order to ensure that it meets the constitutional threshold for sufficiently protecting speech. *Id.* at 498-513.

638 (9th Cir. 1982); *Page v. Something Weird Video*, 960 F. Supp. 1438 (C.D. Cal. 1996).[11]

Because there was no misappropriation in the mere use of the name and photo, it is apparent that what upsets Solano is what is conveyed by the headlines surrounding his name and image, none of which contains his name. Playgirl's position is that such claims, based solely on falsity and not in any real sense on misappropriation of Solano's merchandising rights, are not properly addressed by this tort, and instead sound in defamation or false light.[12]

VI. CONCLUSION

Respondent Solano filed this suit because he did not like seeing his photograph on the cover of *Playgirl* magazine. While many may sympathize, the law does not permit recovery on such a theory. The Ninth Circuit was correct when it said, "Solano cannot prevail on his false light claim simply by arguing that Playgirl put him on the cover of a magazine that contains explicit content." (App. 7a.) For this it cited *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984), in which the Ninth Circuit said the plaintiff had no right to choose the forum in which his photo was displayed. *Id.* at 530.[13]

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[11] Unlike in *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983), the story inside the magazine was not alleged to be false – Solano confirmed that it was true. Bellucci testified that Playgirl's practice, as a matter of simple "good journalism," was always to have an article about or some reference to the person featured on the cover inside the magazine. (Reply App 3.) He considered the piece on Solano inside the cover to be news. (Reply App 3-4.)

[12] This Court has emphasized the importance of ensuring that the perimeters of unprotected categories of speech are confined within narrow limits. *See Bose Corp.*, 466 U.S. at 505.

[13] Many other courts have made similar rulings. *See, e.g., Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980); *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1356 (N.D.

(Continued on following page)

Although the Ninth Circuit stated that the *headlines* surrounding Solano's cover photograph – in combination with the context – created the impression of nudity, rather than the context alone, this is a false distinction: Not every headline on the cover can refer or does refer to Solano. Playgirl has a First Amendment right to publicize on its cover the nude and other content it does have, in addition to publicizing the story it has about Solano. If Solano cannot by law stop an explicit magazine from using his photograph, he certainly should not be able to choose whether the text surrounding his photograph is explicit, yet it is that asserted individual right to censor the press that Solano's suit seeks to accomplish. There must be a limit to how far an individual's personal tastes – even if shared by large segments of the society – can extend to control the content of a magazine. This case presents that limit, and for that reason, Playgirl requests that the Court grant its petition.

Respectfully submitted,

KENT R. RAYGOR,
Counsel of Record
AMY JOHNSON HARRELL
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
333 South Hope Street,
48th Floor
Los Angeles, California 90071
(213) 620-1780

Counsel for Petitioner

October 28, 2002

Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986); *Handelman v. Hustler Magazine*, 469 F. Supp. 1053, 1060 (S.D.N.Y. 1979) ("[M]agazines with sexually explicit text and photographs of genitalia are part of our contemporary scene. Successful candidates for the presidency of the United States consent to interviews in magazines of the same genre as Hustler.").

REPLY APPENDIX A

[Excerpts of Deposition Testimony]
[*Ninth Circuit APPELLANT's ER 519, 600, 602, 603-606, 976, 980-982, 988, 1002-1003, 1007, 1019-1023, 1051, 1059, 1066, 1079, 1082, 1116, 1119-1120, 1144-1149*]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC. and DOES 1 through 25, inclusive, Defendant.	No. 00-01242 DT (Ex)

Videotape deposition of the defendant PLAYGIRL, INC. by **CARMINE BELLUCCI**, taken by plaintiff, pursuant to notice, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 1, 2000 at 2:00 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

[ER 980-982]

Q What does Playgirl have in common with Time magazine?

A Provide news and entertainment to a reader.

Q What kind of news does Playgirl provide?

A Well, review books, albums. We'll often provide entertainment news and news interests. Interesting news stories to a female audience.

Q News stories on what subjects?

A The latest contraceptive.

Q Any other news topics that Playgirl provides content on for its readers?

A Relationship issues.

Q Can you think of any other news topics that Playgirl reports on for its readers?

A Women's health.

Q Any others?

A Women's entertainment.

. . .

Q Is there anyone who works for Playgirl as a salaried employee whose job it is to seek out and report the news?

A Yes.

. . .

[ER 519]

Q What's your understanding of the word exposed?

A It's reportage. It's journalistic exposure.

Q Can exposed also refer to photographic exposure?

A Yes.

Q Can exposed also refer to being exposed in a nude photograph?

A Perhaps.

. . .

[ER 988]

Q What are some other factors that enter into your selection of a cover photograph for the cover of Playgirl magazine?

A The cover image must be featured inside.

Q What do you mean by "the cover image must be featured inside?"

A Who was on the cover. We must have an article or some reference to him inside the publication also.

Q Why is that a factor you take into account?

A Just good journalism.

Q Why do you consider that to be good journalism?

A Because I wouldn't present an image on the cover if there was not something that they could read about that individual inside.

. . .

[ER 1002-1003]

Q Is there anything about the description of Mr. Solano that appears on this page that you would consider news?

A Yes.

Q Tell me what content that appears on this page you consider to be news?

A We're talking about the character that he plays, we're giving information on the television show in which he appears, the character that he plays within that television show. We are talking about – we're giving information on his background. He was a junior Olympic soccer champion. A former U.S. Navy medic. Desert Storm veteran. We also gave some other pertinent information. He was voted Man of the Year by Young Miss magazine. I would consider all of that relevant information, news information.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC. and DOES 1 through 25, inclusive, Defendant.	No. 00-01242 DT (Ex)

Rough Draft

MR. GREEN:

Good morning.

Here begins Videotape No. 1 of the deposition of **CLAIRE VIGUERIE** taken in the matter of Solano versus Playgirl in the U.S. District Court of Central District California. The case number is 00-01242 DT (Ex). Today is January 20th, 2001. The time is approximately 12:06 PM. The deposition is being taken at Professional Shorthand Reporters, Incorporated, located at 601 Poydras

Street, Suite 1615, New Orleans, Louisiana, and was made at the request of Jonathan H. Anschell of the law offices White, O'Connor, Curry, Gatti & Avandazo. The videographer is Patrick Green employed with Esquire Deposition Services located at 622 Wilshire Boulevard, Los Angeles, California.

. . .

[ER 1119-1120]

Q If I were to ask you to describe in a sentence or two what the purpose or mission of Playgirl Magazine was when you were the editor in chief, could you do that?

A I'll think for one second.

Q Sure.

A I wanted to provide erotic entertainment – erotic entertainment to women and address women in a mature, adult and sexy way that I found was not being done in other magazines.

Q When you were editor in chief, did you consider Playgirl to be a news magazine?

A A nude or a news?

Q News. I'll spell it so the record is clear. N-E-W-S.

A Yes.

Q You did?

A Yes.

Q In what way was Playgirl a news magazine?

A We published stories that we thought would appeal to women. We published very informative sexual education articles, we talked about women's issues that I think got short shrift in other women's magazines, and we also reported on – we balanced that with who we think is hot right now, these are people you should be noticing, what CD you might like, Internet sites that are interesting to you. It was an entertainment but also a lot of information magazine.

. . .

[ER 1144-1145]

Q At the time the January 1999 cover was put together, did you have an understanding of what message was being conveyed by the use of the term "Primetime's Sexy Young Stars Exposed"?

A Yes.

Q And what was your understanding?

A That we would reveal sexy pictures and information about these men.

. . .

[ER 1146]

Q So would it be fair to say that the purpose of this banner line, the way it was written when the January 1999 issue was being prepared, was to convey the impression that there were nude photos of the television stars inside the magazine without expressly saying that?

A Sexy photos I would say more. We would – I mean, I would want people to think that there would be something that they hadn't seen of Jose Solano inside, but without stating that.

Q Okay. What do you mean by people thinking that there was something about Jose Solano that they hadn't seen before?

A Well, we always tried to give something a Playgirl twist, which was just, you know, "I like Jose Solano, I see him on Baywatch, but Playgirl is going to tell me something about him that I don't know."

. . .

[ER 1147-1149]

Q Let me direct your attention a little bit further down and to the left. Do you see the phrase that says "12 Sizzling Centerfolds Ready To Score With You"?

A Yes

Q Now, is that the place on the cover of the magazine where there's ordinarily a headline pertaining to the cover man, the man who appears on the cover?

A I don't think it's ever any set placement.

Q Okay. Now, as you can recall, at the time the January 1999 issue of Playgirl was being prepared, did you think it was possible that somebody seeing this magazine might conclude from the "12 Sizzling Centerfolds Ready To Score With You" headline that there was a centerfold of Jose Solano inside the magazine?

A No.

Q Why not?

A Because I know how we do our cover lines and how cover lines are generally done. It's not two separate cover lines relating to the same feature.

Q And that's something you know based on your experience at Playgirl. Correct?

A I think I noticed that on other magazines, too. I generally look in the bottom right corner for who the person on the cover is.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC. and DOES 1 through 25, inclusive, Defendant.	No. 00-01242 DT (Ex)

Videotape deposition of the defendant PLAYGIRL, INC. by **JOANNE CHIARAMONTE,** taken by plaintiff, pursuant to notice, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 2, 2000 at 10:30 a.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

[ER 1019-1020]

Q Do you have an understanding of the meaning of the banner that appears on this cover "Primetime's Sexy Young Stars Exposed"?

A I suppose I have my own feelings about what it means.

Q And that's all I'm entitled to. So what do you understand this banner to mean?

A TV actors in primetime of course who are attractive with – to me, you know, it's a journalistic story inside.

Q Do you have an understanding of the word exposed?

A Again, I have my own – my own feeling.

Q Could you tell me what it is?

A To me it's a word that journalists/editors use to explain a story, a revealing story.

. . .

[ER 1021-1022]

Q My question is whether in January whether when you worked on the January 1999 issue of Playgirl magazine, whether you considered that possibility, that a reader might believe based on the banner "Primetime's Sexy Young Stars Exposed", that pictures of Jose Solano nude appeared inside the magazine?

A Again, I can't guess as to what somebody else, a reader is going to guess. From my own personal opinion, being familiar with the magazine of course as the art

director, no. If we had Jose Solano nude, we would clearly state that we had him nude.

. . .

[ER 1023]

Q What about the headline that reads, "12 Sizzling Centerfolds"? As you look at Exhibit 1 you see that the word centerfold touches onto Jose Solano's shoulder. Do you see that?

A Sure.

Q Did you give any thought to the possibility that a Playgirl reader seeing that headline might expect to see a centerfold of Jose Solano in the magazine?

MR. RAYGOR: Objection. Calls for speculation as to what the Playgirl reader might or might not expect.

Q And again, Ms. Chiaramonte, I'm not asking you to read the minds of others. I'm just asking whether you personally gave any thought when you were working on the cover of this issue to the possibility that readers might expect to see a Jose Solano centerfold in the magazine?

A In my opinion, no. The "12 Sizzling Centerfolds," that's something we do annually. Any of our readers know that once a year they get to vote for their centerfold, vote for Man Of The Year. So, you know, I really didn't take that into consideration. There's many things that touches skin that for visual reasons we did.

Q As you sit here today, do you recall giving any thought at the time you worked on the January 1999 issue as to whether potential readers or members of the public might see the cover and think that there was a Jose

Solano centerfold inside the magazine? Do you remember thinking about that as you sit here today?

A Again, it was a while ago. But I would say no. Because it clearly states here this is Jose Solano and this is referring to him.

MR. RAYGOR: For the record –

THE WITNESS: I'm sorry?

MR. RAYGOR: For the record, the witness is pointing at the lower right-hand corner touching the phrase that says "Baywatch's Best Body, Jose Solano" on the first page of Exhibit 1.

Q Did you give any thought when you were working on the January 1999 issue of Playgirl magazine to the possibility that a reader seeing the phrase "Hot Celebrity Buns" and seeing a photograph of Jose Solano on the cover might expect to see Mr. Solano's buns on the inside of the magazine?

MR. RAYGOR: Again, objection. Calls for speculation as to what any reader reading that might expect or not.

Q Did you consider that possibility, Ms. Chiaramonte?

A Again, like I stated before, if we did have Jose Solano's buns in the magazine, it would have been right here. So I did not think that the reader would think that.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC. and DOES 1 through 25, inclusive, Defendant.	No. 00-01242 DT (Ex)

Videotape deposition of **THERESA O'ROURKE**, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 2, 2000 at 2:00 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

[ER 602, 1079]

Q Do you remember anyone in the cover line meeting for the January 1999 issue saying anything in particular about the possibility that readers might expect to see primetime's TV stars nude inside the magazine based on the phrase "Primetime's Sexy Young Stars Exposed"?

A Yes. That would be, you know, a subject of debate every time we had a cover line meeting. Because some of us didn't feel like it was fair to do that.

. . .

Q Let me see if I can focus your recollection specifically on the meeting regarding the January 1999 issue. And if you can sort of separate that in your mind in any way from the other cover line meetings. Do you remember

any particular discussion about the banner "Primetime's Sexy Young Stars Exposed"?

A Not really.

. . .

[ER 600]

Q Let me ask you also to focus on the phrase "12 Sizzling Centerfolds Ready To Score With You."

A Hmm-hmm. Yes.

Q At the time that cover line was written did you know that it would be appearing somewhere near Jose Solano's picture on the January 1999 cover?

A Yes. It was done for a reason.

. . .

[ER 603-606, 1082]

Q You're pointing to the space where the "12 Sizzling Centerfolds" language is?

A Yes.

Q And that ordinarily is where language pertaining to the cover subject would appear on a cover –

A Yes.

Q – of Playgirl?

A So originally, you know, we would go about it where, say, okay, now here's our cover subject. What are we going to say about him. But we had already decided that we were going to use our TV Guys thing as a banner which is on top of the Playgirl logo, the "Primetime's Sexy

Young Stars Exposed" headline. So being that we already had that, we were then talking about, okay, what's the next biggest thing we have in here. And the next biggest thing we had in there was the Man Of The Year ballot. But we didn't just want to put Man Of The Year ballot because that's just boring. So we wanted to give the illustration that there were 12 centerfolds in there. Which, I guess, yes, there were 12 centerfolds because there were 12 men in there who were centerfolds for Man Of The Year ballot. So then we came up with this cover line for "12 Sizzling Centerfolds," and we put it there. Because I remember talking with Carmine. We thought that the 12 number would pop out at you well over here where usually the cover, subject cover line would go.

Q Do you in specific remember any discussion at the cover line meeting about the possibility that readers might think that Jose Solano was one of the "12 Sizzling Centerfolds"

A I think so. I remember I didn't say anything. I think Christine may have said something. But I don't know. I can't put words in her mouth. But I know something was voiced because we'd always say this is always where the cover subject goes. So, you know, someone's going to think that he's naked in there.

Q And you think it may have been Christine Garcia that said that at this meeting?

A It may have been, yes. But I'm not sure.

Q Do you remember if anything was said in response to that sentiment being voiced?

A That was always kind of blown off.

Q Blown off by whom?

A Carmine. It was just, so what.

Q Okay.

A So . . .

Q Did Carmine Bellucci ordinarily in Playgirl cover meetings belittle the suggestion that readers might expect to see the cover man nude inside the magazine because of the cover language?

A I don't think he was belittling it, like he was just so flippant about it. I just think that he had gotten so used to this was always what we did. So what are we doing. We're not – you know, he didn't, really didn't think there was anything wrong with having 12 there next to the body because he didn't think it was suggesting anything. Whereas, with us, we worked there and we knew that the cover subject always went there. So we, I think, coming into it we were kind of – we would overanalyze things so . . .

Q As you recall –

MR. RAYGOR: Please try not to interrupt her answers.

Q I'm sorry, Ms. O'Rourke. Were you done?

A Yes, pretty much. I just said that we would overanalyze things because we knew that we dealt with this like so methodically. Here's the cover, subject cover right now. Then we're going to put this. And our features are going to go lower down. So we would naturally just say, hey, isn't that going to look strange if we do that. And Carmine would just be like, "Oh, so what." Okay?

Q Just so that our record is clear, there were a number of you who would participate in the Playgirl cover meetings who regularly worked exclusively on Playgirl, right?

A Yes.

Q And when you worked with Mr. Bellucci did he work on other magazines as well as Playgirl?

A Yes.

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FOR THE CENTRAL DISTRICT OF CALIFORNIA
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JOSE SOLANO, JR., Plaintiff, v. PLAYGIRL, INC. and DOES 1 through 25, inclusive, Defendant.	No. 00-01242 DT (Ex)

Videotape deposition of **SERENA SPIEZIO**, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 1, 2000 at 4:45 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

[ER 1059]

A . . . Joanne and Carmine are the final decision-makers of the cover.